

DOCKET FILE COPY ORIGINAL

ORIGINAL

ANN BAVENDER*
ANNE GOODWIN CRUMP
VINCENT J. CURTIS, JR.
PAUL J. FELDMAN
FRANK R. JAZZO
ANDREW S. KERSTING
EUGENE M. LAWSON, JR.
SUSAN A. MARSHALL*
HARRY C. MARTIN
RAYMOND J. QUIANZON
LEONARD R. RAISH
JAMES P. RILEY
ALISON J. SHAPIRO
KATHLEEN VICTORY
JENNIFER DINE WAGNER*
HOWARD M. WEISS
ZHAO XIAOHUA*

* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209-3801

(703) 812-0400

TELECOPIER

(703) 812-0486

INTERNET

www.fhh-telcomlaw.com

RETIRED MEMBERS
RICHARD HILDRETH
GEORGE PETRUTSAS
CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYS
U. S. AMBASSADOR (ret.)

OF COUNSEL
EDWARD A. CAINE*
MITCHELL LAZARUS
EDWARD S. O'NEILL*

WRITER'S DIRECT

RECEIVED

OCT 31 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 31, 2000

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: MM Docket 95-88
RM-8641, RM-8688, RM-8689

Dear Ms. Salas:

Transmitted herewith, on behalf of Woolstone Corporation, are an original and sixteen copies of its "Reply to Opposition to Motion to Strike" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump
Counsel for Woolstone Corporation

AGC:mah
Enclosures

No. of Copies rec'd 0+16
List A B C D E

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED

OCT 31 2000

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	MM DOCKET NO. 95-88
)	
Amendment of Section 73.202(b),)	RM-8641
Table of Allotments,)	RM-8688
FM Broadcast Stations.)	RM-8689
(Rose Hill, Trenton, Aurora, and)	
Ocracoke, North Carolina))	

Directed to: The Commission

REPLY TO OPPOSITION TO MOTION TO STRIKE

Woolstone Corporation ("Woolstone"), by its attorneys, hereby respectfully submits its Reply to the Opposition to Motion to Strike filed by Conner Media Corporation ("CMC") in the above-captioned proceeding on October 19, 2000. With respect thereto, the following is stated:

1. In its Motion to Strike, Woolstone seeks to have stricken from the record in this proceeding the new information, never previously presented to either the Commission or its staff, included in CMC's Reply to Opposition to Application for Review ("Reply") in this proceeding. Woolstone further demonstrated that consideration of the new information would not assist in the resolution of this proceeding, as the introduction of a new potential transmitter site for the Aurora allotment raises more questions than it answers. Specifically, Woolstone showed that the proposed new site is bounded by water, located in the Gum Swamp Bear Sanctuary, and is short-spaced to WAAE(FM), the Channel 224C1 allotment at Ocracoke, North Carolina, and a pending upgrade application for WBJD(FM).

2. CMC devotes the bulk of its Opposition to providing further information and arguments designed to demonstrate that the proposed new transmitter site on Weyerhaeuser land could be a viable transmitter site. CMC's submissions, however, are largely irrelevant to the central point, namely that the facilities to which the proposed site is short-spaced still exist, and this is not the proper proceeding in which to seek changes in either the Ocracoke allotment or WAAE(FM)'s facilities.¹ The fact remains that no matter how suitable the site might be for construction of a hypothetical broadcast tower, substantial technical difficulties remain with its use for Channel 221A at Aurora.² CMC has provided no information to overcome Woolstone's showings with regard to the short-spacings at the proposed new site. It must therefore be concluded that CMC has no such information to provide.

3. CMC's sole response on this issue is to say that it is not proposing to change the allotment reference co-ordinates to its newly identified site. CMC correctly states the principle that the Commission's spacing rules can be more flexible at the application stage, so long as a fully-spaced

¹ The proper procedure with regard to the Ocracoke allotment would be for CMC to file a petition to delete. Obviously, CMC is concerned with such a procedure since it knows that there are parties, outside of this proceeding, that would oppose any such move and have indicated a willingness to file for the allotment. In fact, CMC has demonstrated its concern by filing "Comments Regarding the Addition of Channel 224C1, Ocracoke, NC, to Auction No. 37" in the FM auction proceeding. In those Comments, CMC has sought to have the Ocracoke allotment deleted from the auction so that interested parties may not file for it at this time.

² Woolstone would merely note in passing the remarkable lack of support for a number of the statements made by CMC. For example, Howard Spence of Weyerhaeuser states in a memo to CMC's real estate broker that the bear sanctuary designation would be no problem as that designation could be changed by a new owner, but he points to no authority for this assertion. Likewise, that broker attempts to bolster Mr. Spence's statements in an unsworn letter to CMC's counsel, in which he, without support, claims some sort of expert status for Mr. Spence which Mr. Spence does not claim for himself.

allotment site has been identified. Once again, however, CMC's comment is irrelevant, as the cited principle has no application in this proceeding. No fully-spaced allotment reference site for Channel 221A at Aurora has yet been established. The reference site proposed by CMC also is short-spaced to both WAAE(FM) and the Ocracoke allotment. Further, Woolstone has previously demonstrated in this proceeding that use of the allotment reference site would be infeasible, as it is located adjacent to Gum Swamp and close to a U.S. Coast Guard station. As has previously been noted both by the Commission's staff in its *Memorandum Opinion and Order*, DA 00-1312, released June 16, 2000 ("*MO&O*"), and by Woolstone in this proceeding, neither short-spacing can be removed simply by fiat in this proceeding. Rather, further proceedings would be required to examine any deletion or change in the Ocracoke allotment and any change in channel for WAAE(FM).

4. Through the course of this proceeding, it has become clear that there is, in fact, no usable, fully-spaced site available for Channel 221A at Aurora. CMC has struggled mightily to find one, but it has failed to do so. The only potentially viable site identified by CMC, like its proposed allotment reference site, suffers from short-spacing difficulties. Further, given the fact that much of the surrounding area is covered by either swamp or river, there are very few, if any, other potential sites which could be used for a broadcast tower. Even if it were possible to submit a technically acceptable application for the CMC site through use of contour protection, a station so authorized would receive interference protection based only on its actual contours rather than assumed maximum facilities. *See* 47 C.F.R. §73.215(b)(2)(iii). Additionally, it is possible that a directional antenna would be required, thereby cutting down an Aurora station's ability to provide coverage in certain areas. Thus, in effect, CMC is asking the Commission to exchange a fully-spaced channel for a channel which would be forever limited by spacing constraints. Such a substitution hardly

represents an equal exchange, is contrary to fundamental fairness, and would deprive Woolstone of its rights in this proceeding. While FM channels are generally presumed to be equivalent, such is not the case in this instance. A channel which is so constrained by spacing difficulties clearly is not the equivalent of a fully-spaced channel.

5. Further, it should be noted that a change in channel from Channel 283A to Channel 221A would cause substantial injury to Woolstone. CMC notes in passing that the Aurora station is unbuilt. While it is true that construction of the station has not been completed, the fact remains, contrary to CMC's suggestion, that Woolstone has expended substantial funds in preparing to go forward with construction. Woolstone recognizes that its construction permit was conditioned upon the outcome of this proceeding. Nonetheless, expiration date listed on the permit is January 12, 2001, a date which is fast approaching. Until Woolstone received a copy of the Commission's letter of October 23, 2000, in which it granted Woolstone's request for tolling of the construction period, Woolstone had no certainty that it would have additional time in which to complete construction. Accordingly, prior to its receipt of the letter, Woolstone had spent and committed thousands of dollars for such items as tower and studio engineering, site preparation, and lease payments so that it could be ready to meet the January 12, 2001, deadline if necessary.

6. Disingenuously, CMC chides Woolstone for including a substantive response to CMC's new proposal in Woolstone's Motion to Strike. It should be noted, however, that any substantive response to the new matter introduced in CMC's Reply was included in order to demonstrate that going outside of the Commission's rules to consider such new matter would not assist the Commission in resolution of this proceeding. Given the lack of probative value of the new information, the Commission's interest in maintaining the integrity of its processes clearly outweighs

any benefit to be gained from consideration of the new material submitted at such a late date.³

Woolstone has demonstrated, that regardless of whether the proposed new Weyerhaeuser site could be available to Woolstone, that site suffers from technical defects in that it is short-spaced to other facilities and allotments. Furthermore, CMC's alternate proposal to allot Channel 221A in lieu of Channel 283A at Aurora continues to violate the Commission's well-established policy that alternate channels suggested after the counterproposal deadline to resolve a conflict between proposals may not be considered if such an alternate proposal introduces a new community into the proceeding.

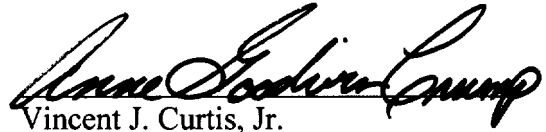
Therefore, in light of the substantial defects of CMC's proposal outside of the ability to find a usable transmitter site, no useful purpose would be served by consideration of the new information submitted in CMC's Reply or in its Opposition to Motion to Strike. To make an exception to the Commission's rules barring introduction of new matter at the application for review stage and in a reply in order to consider such information would set an unfortunate precedent which could open the door to many more such eleventh hour filings. Accordingly, the Commission should now reject the new information provided by CMC in its Reply and expeditiously resolve the outstanding issues by denying CMC's application for review and affirming the *MO&O*. The public interest and the Commission's interest in orderly processes would be best served by expeditiously moving forward to conclude this proceeding so that Woolstone may complete construction of the Aurora station and bring a first local service to that community.

³ CMC's claim that it simply wishes the Commission to proceed with a complete and updated record rings particularly hollow in light of its own refusal fully to explain its delay in submitting the information in question.

WHEREFORE, the premises considered, Woolstone respectfully requests that the Commission strike the newly submitted information contained in CMC's Reply and Opposition to Motion to Strike, deny CMC's Application for Review and affirm the *MO&O* in the above-captioned proceeding.

Respectfully submitted,
WOOLSTONE CORPORATION

By:



Vincent J. Curtis, Jr.
Anne Goodwin Crump

Its Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street
Eleventh Floor
Arlington, Virginia 22209
(703) 812-0400

October 31, 2000

CERTIFICATE OF SERVICE*

I, Mary A. Haller, a secretary in the firm of Fletcher, Heald & Hildreth, P.L.C., do hereby acknowledge that true copies of the foregoing "Reply to Opposition to Motion to Strike" were sent this 11th day of October, 2000, by first-class United States mail, postage prepaid, to the following:

Arthur D. Scrutchins*
Federal Communications Commission
Mass Media Bureau
445 12th Street, S.W., Room 3-A234
Washington, DC 20554

Ellen Mandell Edmundson, Esquire
Pepper & Corazzini, LLP
1776 K Street, N.W., Suite 200
Washington, DC 20006

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Ave., N.W., Suite 301
Washington, DC 20016

*BY HAND DELIVERY


Mary A. Haller

**Service for Bruce Cotton is hereby acknowledged.